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MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-5 OF
1995(W)

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STEVE SHIM CJ (SABAH AND SARAWAK), SITI NORMA YAAKOB AND
HAIDAR FCJJ

16 MAY 2002

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Civil Procedure — *Judge* — *Retirement of trial judge before delivery of judgment* — *Whether court duly constituted* — *Whether judgment invalid as it was delivered after retirement of one out of three presiding judges* — *Whether judgment was tainted by apparent bias on part of presiding judge* — *Courts of Judicature Act 1964 s 78*

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Civil Procedure — *Pleadings* — *Amendment of* — *Error of civil appeal number* — *Whether amendments changed character of dispute and not made bona fide on part of applicant and caused prejudice to respondent which could not be compensated in costs*

E

Statutory Interpretation — *Construction of statutes* — *Contextual approach* — *Interpretation of words used in phrase 'the hearing of the proceeding shall, if the parties consent continue before ... the remaining judges of the court, not being less than two ...'* — *Whether consent of parties required where actual hearing of appeal had concluded pending reserved judgment before retirement of the judge* — *Courts of Judicature Act 1964 s 78*

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The respondent's claim against, among others, the applicant for defamation and conspiracy to defame was allowed at the High Court (see [1995] 1 MLJ 39) and the subsequent appeal to the Court of Appeal by the applicant was dismissed (see [1995] 2 MLJ 493). At the Federal Court, the appeal was heard by a panel comprising of Eusoff Chin Chief Justice, Wan Adnan CJ (Malaya) and Chong Siew Fai CJ (Sabah and Sarawak) on 12 and 13 January 1998 and judgment was reserved. On 12 July 2000, judgment of the court by Eusoff Chin Chief Justice, the presiding judge ('the Federal Court judgment') was read out by the senior assistant registrar (see [2000] 4 MLJ 77). At the

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time of the delivery of the judgment, Chong Siew Fai CJ (Sabah & Sarawak) had retired from the Bench on 2 July 2000. Both Wan Adnan CJ (Malaya) and Chong Siew Fai CJ (Sabah and Sarawak) had intimated their approval to the written judgment of the presiding judge. The applicant applied by way of motion to set aside the Federal Court judgment on the grounds that: (i) the judgment was invalid as

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it was delivered by an improperly constituted court; and (ii) the judgment was tainted by apparent bias on the part of the presiding judge. The respondent reciprocated by filing a second motion to strike out the applicant's first motion on grounds of irregularities. A third motion was filed by the applicant seeking to amend the first motion.

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Held, by majority allowing the applicant's application and dismissing the respondent's application:

- (1) (per **Siti Norma Yaakob FCJ**) The third motion sought to correct an erroneous civil appeal number. The allegations of misconduct on the part of the applicant that he had delayed in seeking to amend, tampered and altered the civil suit number in his pleadings and possessed bad faith in making the application seemed out of context and appear to be misplaced. The proposed amendments sought no more than to correct a defect in the pleadings and since the amendments: (i) did not change the character of the dispute into another and inconsistent character; (ii) were made bona fide on the part of the applicant; and (iii) caused no prejudice to the respondent which could not be compensated in costs, the motion was allowed (see pp 693H–694B); *Looi Guan Kway v Low Lean Bok & Ors* [1938] MLJ 35 and *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213 followed. A
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- (2) (per **Siti Norma Yaakob FCJ**) The effective date of any judgment was the date of its pronouncement in open court and not any other earlier acts aimed at arriving at a decision; *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2000] 4 MLJ 1 followed. In this case there were only two judges remaining on 12 July 2000, who were capable of functioning as judges of that court, the third having been retired before that date. Under such circumstances, if there was to be any saving, it could only be done under s 78 of the Courts of Judicature Act 1964 ('the CJA') (see p 696F–G). D
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- (3) (per **Siti Norma Yaakob FCJ**) The relevant provisions of s 78 of the CJA both in its original and amended forms, specifying the reasons for the absence of a judge were wide enough to include a judge who has retired, died or dismissed. This was clear from the words 'any other cause' appearing in the phrase 'unable through illness or any other cause to attend the hearing or otherwise exercise his function of a judge of the court'. Those words admitted to the interpretation that the other reasons why the absent judge could not function as one may well be due to his retirement, death or dismissal (see p 697E–F). F
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- (4) (per **Siti Norma Yaakob FCJ**) Whilst s 78 of the CJA regulated the procedure to be followed when a judge was absent, the pre-amendment requirement that the parties gave their consent to the remaining two judges to proceed with the hearing and pronounce a judgment, was very much a substantive right. This was so as at the time of the commencement of the applicant's appeal, arguments were heard by a three member panel and there was that expectation that the same three member panel would arrive at a decision based on what was presented before it. However in the absence of one member of the panel, proceedings may still continue but subject to the parties consenting to the remaining two members of the panel bringing the hearing to a conclusion and any decision reached must be a majority one (see p 698C–E). H
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- A (5) (per **Siti Norma Yaakob FCJ**) The parties were vested with the right to control the proceedings of a hearing for without their consent, the applicant's appeal had to be ventilated afresh before another panel. The applicant's entitlement to control the proceedings constituted an interest that accrued at the commencement of his appeal and was protected by s 30(1)(b) of the Interpretation Acts 1948 and 1967, which stated that the repeal of a written law in whole or in part shall not affect any right, accrued or incurred under the repealed law (see p 698E–F).
- B (6) (per **Haidar FCJ**) The failure to get the consent of the applicant has occasioned an injustice to the applicant. The remaining judges should have obtained the consent of the applicant before delivering the reserved judgment even though it could be considered as a majority judgment and it was a properly constituted court. As the consent of the parties was not obtained before the reserved judgment was given and it being a substantive right of one of the parties, that is, the applicant, it followed that the judgment of the court was invalid and under the original s 78(1) read with s 78(3) of the CJA, the proper order would be for the appeal to be re-heard before another panel (see p 705E–G).
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- D (7) (per **Steve Shim CJ (Sabah & Sarawak)**; **Siti Norma Yaacob** and **Haidar FCJJ** concurring) The applicant had knowledge of all matters grounding his complaint of bias before judgment was delivered. He had ample time and opportunity to take the appropriate action but he did nothing. He waited until judgment was delivered months later; it was an afterthought action. He only decided to complain about bias after he had lost the appeal. If he had not lost, it was quite certain that he would not have filed the motion. The doctrine of waiver had militated firmly against him. Such conduct would have a contagious and adverse effect upon the veracity of the applicant's complaint of apparent bias against the presiding judge thereby rendering the second ground advanced by him to be of little value, if any (see p 692A–C); *Locabail (UK) Ltd v Bayfield Properties Ltd and other appeals* [2000] 1 All ER 65 followed.
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- G (8) (per **Steve Shim CJ (Sabah & Sarawak)**) The Federal Court had the inherent jurisdiction and power which could be invoked in limited circumstances to re-open, re-hear and re-examine its previous judgment, decision or order which had been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court (see pp 683I–684A).
- H (9) (per **Steve Shim CJ (Sabah & Sarawak)** dissenting) Reading the unamended s 78 of the CJA as a whole, the need for consent of the parties was confined to the continued hearing as opposed to the concluded hearing of a proceeding before the remaining panel of judges. This much was clear from the words used in the phrase
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‘the hearing of the proceeding shall, if the parties consent continue before ... the remaining judges of the court, not being less than two...’. Ordinarily, to ‘hear’ a cause or matter meant to hear and determine it unless there was something which, by natural intendment or otherwise, would cut down that meaning (see p 688B–D).

- (10) (per **Steve Shim CJ (Sabah & Sarawak)** dissenting) However, a contextual approach had to be adopted in this case. Thus, on a proper construction, it must necessarily mean that where the actual hearing of a case was still continuing at the time of the inability of any judge, either through illness or any other cause, consent of the parties was required before the hearing could be continued or proceeded with. Where however the hearing of the case had already been concluded or completed pending judgment or reserved judgment at the time of the inability, no consent was needed; *PP v Sihadudin bin Haji Salleh & Anor* [1980] 2 MLJ 273 followed. From these facts, the actual hearing of the appeal had concluded pending reserved judgment before the retirement of Chong Siew Fai CJ (Sabah and Sarawak). As such, no consent of the parties needed to be sought (see pp 688D–F, 689B–C).

[Bahasa Malaysia summary]

Tuntutan responden terhadap, antara lain, pemohon kerana fitnah dan komplot untuk memfitnah telah dibenarkan di Mahkamah Tinggi (lihat [1995] 1 MLJ 39) dan rayuan selanjutnya ke Mahkamah Rayuan oleh pemohon telah ditolak (lihat [1995] 2 MLJ 493). Di Mahkamah Persekutuan, rayuan tersebut telah didengar oleh satu panel yang terdiri daripada Eusoff Chin Ketua Hakim Negara, Wan Adnan Hakim Besar (Malaya), and Chong Siew Fai Hakim Besar (Sabah dan Sarawak) pada 12 dan 13 Julai 1998 dan penghakiman telah ditangguhkan. Pada 12 Julai 2000, penghakiman mahkamah oleh Eusoff Chin Ketua Hakim Negara, hakim yang mempengerusikan mahkamah (‘penghakiman Mahkamah Persekutuan tersebut’) telah dibaca oleh penolong kanan pendaftar (lihat [2000] 4 MLJ 77). Pada masa penghakiman diputuskan, Chong Siew Fai Hakim Besar (Sabah dan Sarawak) telah bersara daripada Anggota Kehakiman pada 2 Julai 2000. Kedua-dua Wan Adnan Hakim Besar (Malaya) dan Chong Siew Fai Hakim Besar (Sabah dan Sarawak) telah memberi persetujuan mereka terhadap penghakiman bertulis hakim yang yang mempengerusikan mahkamah tersebut. Pemohon telah membuat permohonan melalui usul untuk mengetepikan penghakiman Mahkamah Persekutuan tersebut atas alasan bahawa: (i) penghakiman tersebut adalah tidak sah kerana ia telah diputuskan oleh mahkamah yang tidak dibentuk dengan betul; dan (ii) penghakiman tersebut telah dicemari oleh berat sebelah yang nyata di pihak hakim yang mempengerusikan mahkamah pada masa itu. Responden membalas dengan memfailkan satu usul kedua untuk

- A** membatalkan usul pertama pemohon atas alasan luar aturan. Satu usul ketiga telah difaillkan oleh pemohon untuk memohon usul pertama tersebut dipinda.
- B** **Diputuskan**, dengan majoriti membenarkan permohonan pemohon dan menolak permohonan responden:
- C** (1) (oleh **Siti Norma Yaakob HMP**) Usul ketiga bertujuan untuk membetulkan nombor rayuan sivil yang salah. Dakwaan-dakwaan salah laku di pihak pemohon bahawa beliau telah lewat memohon untuk meminda, mengusik dan mengubah nombor rayuan sivil tersebut dalam pliding beliau dan mempunyai niat jahat semasa membuat permohonan tersebut kelihatan seperti terkeluar daripada konteks dan kelihatan tidak patut. Ini lebih-lebih lagi apabila cadangan pindaan memohon tidak lebih daripada untuk membetulkan satu kecacatan dalam pliding tersebut dan memandangkan pindaan sedemikian: (i) tidak akan mengubah sifat pertikaian kepada yang lain dan bersifat tidak konsisten; (ii) telah dibuat secara bona fide bagi pihak pemohon; dan (iii) tidak menyebabkan prejudis ke atas responden yang tidak boleh diberi pampasan dalam bentuk kos, maka usul tersebut dibenarkan (lihat ms 693H–694B); *Looi Guan Kway v Low Lean Bok & Ors* [1938] MLJ 35 dan *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213 diikuti.
- D**
- E** (2) (oleh **Siti Norma Yaakob HMP**) Tarikh kuatkuasa mana-mana penghakiman adalah tarikh ia diumumkan di mahkamah terbuka dan bukan mana-mana tindakan lain untuk tiba kepada satu keputusan; *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2000] 4 MLJ 1 diikuti. Dalam kes ini, hanya terdapat dua orang hakim yang tinggal pada 12 Julai 200, yang berupaya untuk berfungsi sebagai hakim-hakim mahkamah tersebut, di mana yang ketiga telah bersara sebelum tarikh tersebut. Dalam keadaan sedemikian, jika terdapat apa-apa pengecualian, ia hanya boleh dilakukan di bawah s 78 Akta Mahkamah Kehakiman 1964 ('AMK') (lihat ms 696F–G).
- F**
- G** (3) (oleh **Siti Norma Yaakob HMP**) Peruntukan relevan s 78 AMK kedua-dua dalam bentuk asal dan pindaannya, yang menspesifikasikan sebab-sebab ketidakhadiran seorang hakim adalah cukup luas untuk meliputi seorang hakim yang telah bersara, meninggal dunia atau dipecat. Ini adalah jelas daripada perkataan-perkataan 'apa-apa sebab lain' yang timbul dalam frasa 'tidak berupaya oleh sebab kesihatan, atau apa-apa sebab lain untuk hadir perbicaraan atau sebaliknya menggunakan fungsi beliau sebagai seorang hakim mahkamah'. Perkataan-perkataan tersebut mengakui tafsiran bahawa sebab-sebab lain kenapa seorang hakim yang tidak hadir itu tidak boleh berfungsi mungkin sebab persaraan, kematian atau pemecatan beliau (lihat ms 697E–F).
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- (4) (oleh **Siti Norma Yaakob HMP**) Meskipun s 78 AMK mengawal prosedur yang perlu diikuti apabila seorang hakim itu tidak hadir, keperluan pra pindaan di mana pihak-pihak memberikan persetujuan mereka kepada dua orang hakim yang tinggal untuk meneruskan perbicaraan dan mengumumkan satu penghakiman, adalah satu hak substantif. Ini adalah kerana pada masa rayuan pemohon bermula, hujah-hujah telah didengar oleh tiga ahli panel dan wujud satu jangkaan bahawa tiga ahli panel yang sama akan tiba kepada satu keputusan berdasarkan apa yang telah dikemukakan di hadapannya. Namun begitu, dengan ketiadaan seorang ahli panel tersebut, prosiding masih boleh diteruskan tetapi tertakluk kepada pihak-pihak bersetuju terhadap dua ahli panel yang masih tinggal untuk menyelesaikan perbicaraan tersebut dan apa-apa keputusan yang tercapai mestilah majoriti (lihat ms 698C–E). A
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- (5) (oleh **Siti Norma Yaakob HMP**) Pihak-pihak tersebut mempunyai hak untuk mengawal prosiding satu perbicaraan kerana tanpa persetujuan mereka, rayuan pemohon harus dimulakan di hadapan panel lain. Hak pemohon untuk mengawal prosiding membentuk satu kepentingan yang terakru di permulaan rayuan beliau dan adalah dilindungi oleh s 30(1)(b) Akta Tafsiran 1948 dan 1967, yang mengatakan bahawa pemansuhan satu undang-undang bertulis secara keseluruhan atau sebahagiannya tidak sepatutnya menjejaskan apa-apa hak, yang terakru atau tidak terakru di bawah undang-undang yang dimansuhkan (lihat ms 698E–F). D
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- (6) (oleh **Haidar HMP**) Kegagalan untuk mendapatkan persetujuan pemohon dalam kes ini telah mengakibatkan ketidakadilan kepada pemohon. Hakim-hakim yang masih tinggal sepatutnya mendapatkan persetujuan pemohon sebelum menyampaikan penghakiman yang ditangguhkan walaupun ia boleh dikira sebagai satu penghakiman majoriti dan ia adalah satu mahkamah yang dibentuk dengan betul. Memandangkan persetujuan pihak-pihak tidak didapati sebelum penghakiman yang ditangguhkan telah disampaikan dan memandangkan ia satu hak substantif salah satu pihak tersebut, iaitu, pemohon, ini menyebabkan penghakiman mahkamah tersebut tidak sah dan di bawah s 78(1) dibaca dengan s 78(3) AMK yang asal, perintah yang betul adalah untuk rayuan tersebut didengar semula di hadapan panel lain (lihat ms 705E–G). F
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- (7) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak); Siti Norma Yaakob** dan **Haidar HHMP** bersetuju) Pemohon mempunyai pengetahuan mengenai semua perkara yang menjadi dasar aduan berat sebelah beliau sebelum penghakiman diputuskan. Beliau mempunyai masa yang mencukupi dan peluang untuk mengambil tindakan yang sesuai tetapi beliau tidak berbuat demikian. Beliau telah menunggu sehingga penghakiman diputuskan berbulan kemudian; ini merupakan satu tindakan H
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- A** yang telah difikirkan kemudian. Beliau hanya telah memutuskan untuk membuat aduan tentang berat sebelah selepas beliau gagal dalam rayuan tersebut. Jika beliau telah berjaya, pastinya beliau tidak akan memfailkan usul tersebut. Doktrin penepian pastinya telah menghalang beliau. Perbuatan sedemikian akan mempunyai kesan yang berjangkit dan buruk terhadap kebenaran aduan
- B** pemohon tentang berat sebelah yang nyata terhadap hakim yang mempengerusikan mahkamah sehingga menyebabkan alasan kedua yang dikemukakan oleh beliau mempunyai nilai yang sedikit, jika ada (lihat ms 692A–C); *Locabail (UK) Ltd v Bayfield Properties Ltd and other appeals* [2000] 1 All ER 65 diikuti.
- C** (8) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak)** menentang) Mahkamah Persekutuan memang mempunyai bidang kuasa sedia ada dan kuasa yang boleh digunakan dalam keadaan terhad untuk membuka semula, mendengar semula dan memeriksa semula penghakiman, keputusan atau perintahnya yang terdahulu yang telah diperolehi melalui fraud atau tindakan menyekat keterangan material bagi menghalang ketidakadilan atau
- D** satu penyalahgunaan proses mahkamah (lihat ms 683I–684A).
- (9) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak)** menentang) Dengan membaca s 78 AMK secara keseluruhannya, keperluan mendapatkan persetujuan pihak-pihak yang berkaitan adalah terbatas kepada perbicaraan berterusan yang berbeza dengan perbicaraan satu prosiding yang telah selesai di hadapan panel hakim-hakim yang masih tinggal. Ini adalah jelas berdasarkan perkataan-perkataan yang digunakan dalam frasa ‘perbicaraan prosiding tersebut hendaklah, jika pihak-pihak tersebut bersetuju meneruskan di hadapan ... hakim-hakim mahkamah yang masih tinggal, tidak kurang daripada dua ...’.
- E** Biasanya, untuk ‘mendengar’ satu kausa atau perkara bermaksud untuk mendengar dan menentukannya kecuali jika ada sesuatu yang, melalui maksud semulajadi atau sebaliknya, akan mengurangkan maksud tersebut (lihat ms 688B–D).
- F**
- G** (10) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak)** menentang) Namun begitu, satu pendekatan kontekstual mesti diterapkan dalam kes ini. Oleh itu, berdasarkan satu tafsiran yang betul, ia semestinya bermaksud di mana terdapat perbicaraan sebenar satu kes yang masih berterusan pada masa ketidakupayaan mana-mana hakim, sama ada disebabkan
- H** kesihatan atau apa-apa sebab lain, persetujuan pihak-pihak diperlukan sebelum perbicaraan tersebut boleh diteruskan. Di mana sekiranya perbicaraan kes tersebut telahpun selesai atau berakhir sementara menunggu penghakiman atau penghakiman ditangguhkan pada masa ketidakupayaan tersebut, tiada persetujuan diperlukan; *PP v Sihabudin bin Haji Salleh & Anor* [1980] 2 MLJ 273 diikuti. Berdasarkan fakta-fakta berikut, adalah jelas bahawa perbicaraan sebenar rayuan tersebut telah selesai sementara menunggu penghakiman yang ditangguhkan sebelum
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persaraan Chong Siew Fai Hakim Besar (Sabah dan Sarawak). Oleh demikian, tiada persetujuan pihak-pihak yang perlu dipohonkan (lihat ms 688D–F, 689B–C).] **A**

Notes

For cases on amendment of pleadings generally, see 2(1) *Mallal's Digest*, (4th Ed, 2001 Reissue) paras 4396–4423. **B**

For a case on retirement of trial judge before delivery of judgment, see 2(2) *Mallal's Digest*, (4th Ed, 2001 Reissue) para 3348.

For cases on construction of statutes, see 11 *Mallal's Digest*, (4th Ed, 1996 Reissue) paras 1463–1467. **C**

Cases referred to

Auckland Casino Ltd v Casino Central Authority [1995] 1 NZLR 142 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd) **D**

Barrel Enterprises, Re [1972] 3 All ER 631 (refd)

Bright & Co v Sellar (1904) 1 KB 6 (refd)

Boswell & Coak (No 2) (1902) 96 LTR 365 (refd)

Capital Insurance Bhd v Aishah bte Abdul Manap & Anor [2000] 4 MLJ 65 (refd) **E**

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1 (folld)

Colonial Sugar Refining Co Ltd v Irving [1905] AC 369 (refd)

Duke v Reliance Systems Ltd [1987] 2 WLR 1225 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

Locabail (UK) Ltd v Bayfield Properties Ltd and other appeals [2000] 1 All ER 65 (folld) **F**

Looi Guan Kway v Low Lean Bok & Ors [1939] MLJ 224 (refd)

Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors [1986] 1 MLJ 166 (folld)

PP v Sihabudin bin Haji Salleh & Anor [1980] 2 MLJ 273 (folld) **G**

Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)

Ramachandran all Suppiah v PP [1992] 2 SLR 707 (refd)

Scott & Alvarez Contracts, Re (1895) 1 Ch 596 (refd)

Surendra Singh & Ors v State of Uttar Pradesh AIR 1954 SC 194 (refd) **H**

Tai Chai Yu v The Chief Registrar of The Federal Court [1998] 2 MLJ 474 (refd)

W'Field Fr Co v Steel Construction Co [1968] NZLR 680 (refd)

Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors [1983] 1 MLJ 213 (folld) **I**

Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1 (refd)
'Ydun, The' [1899] P 236 (refd)

A Legislation referred to

Courts of Judicature Act 1964 ss 9, 69(4), 74(1), 78, 80, 96
 Courts of Judicature (Amendment) Act 1998 ss 6, 42, 44, 78
 Civil Law Act 1956 s 3(1)(a)
 Excise Act 1901 [Aust]

B Federal Constitution arts 128, 121(2)(c)
 Interpretation Acts 1948 and 1967 s 30(1)(b)
 Judiciary Act 1903 [Aust]
 Public Authorities Ordinance 1948
 Rules of the Federal Court 1995 r 137

C Rules of the High Court 1980 O 92 r 4
 Rules of the Supreme Court [Aust]

Appeal from: Civil Suit No 02–221 of 1994 (Court of Appeal, Kuala Lumpur) and Civil Suit No S5–23–23 of 1994 (High Court, Kuala Lumpur)

D *M Sivalingam (Bastian Pius Vendargon, V Pradhan, Mark Ho, Ramesh Kanapathy and Kamraj Nayagam with him) (Chellam Wong) for the applicant.*

VK Lingam (Adam Bachek and R Thayalan with him) (Adam Bachek & Assoc) for the respondent.

E Steve Shim CJ (Sabah and Sarawak):

The issues

F There are three motions before us. The first motion dated 23 February 2001, was filed by the applicant seeking to set aside the judgment of the Federal Court dated 12 July 2000. The second motion dated 30 March 2001, was filed by the respondent seeking to strike out the applicant's first motion on grounds of irregularities. The third motion dated 4 April 2001, was filed by the applicant seeking to amend the first motion. Because of the nature of the motions filed by the parties concerned, we felt it appropriate to deal with the second motion first. After hearing arguments, we dismissed the second motion for insufficient merit.

G Given the conclusion we take on the second motion, and for the reasons succinctly stated by our learned sister Siti Norma Yaakob FCJ, we find no difficulty in granting the third motion filed by the applicant but with cost to the respondent. This, of course, leaves us with the main motion filed by the applicant, which, as I have said, seeks to set aside the judgment of the Federal Court dated 12 July 2000. Essentially, two grounds have been advanced, namely:

- H** (i) that the judgment was invalid as it was delivered by an improperly constituted court; and
- I** (ii) that the said judgment was tainted by an apparent bias on the part of the presiding judge.

The background

It is appropriate to state briefly the factual background involved. The applicant was sued by the respondent vide Civil Suit No S5-23-23-1994 concerning an article written by the applicant for a monthly magazine. On 22 October 1994, the High Court found against the applicant. The applicant appealed to the Court of Appeal but the appeal was dismissed on 18 April 1995. On 17 July 1995, the Federal Court granted the applicant leave to appeal against the decision of the Court of Appeal. On 12 and 13 January 1998, the Federal Court, comprising of Eusoff Chin Chief Justice, Wan Adnan CJ (Malaya) and Chong Siew Fai CJ (Sabah and Sarawak) (as their Lordships then were), heard the appeal. Judgment was reserved to a date to be fixed. It may be noted that the respondent was at all material times represented by Dato' VK Lingam, including the appeal before the Federal Court. By a letter dated 6 July 2000 from the deputy registrar of the Federal Court, the parties were informed that the decision of the Federal Court would be announced on 12 July 2000 at 9am. On 12 July 2000, the decision was read out by the senior assistant registrar ('the SAR'). There was only one judgment of the court and it was written by Eusoff Chin Chief Justice, the presiding judge.

Jurisdiction

At the outset, counsel for respondent raised a jurisdictional issue. He contends that pursuant to art 128 of the Federal Constitution ('the Constitution') and s 96 of the Courts of Judicature Act 1964 ('the CJA'), the Federal Court has no jurisdiction to set aside its own judgment. Here, he has placed considerable reliance on the Supreme Court case of *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166, drawing particular attention to the relevant passages in the judgment therein which states at p 167:

The question before the court is, therefore, whether sub-s (4) can be construed to confer an unlimited power on the Supreme Court to review, meaning to reopen, reexamine and reconsider with a view to correction, variation, alteration or reversal, if necessary, an earlier decision in an appeal that has already been heard and disposed of.

Our view is that there is no merit in the contention made by the applicants. Subsection (4) of the act cannot be construed to mean that it confers unlimited power upon the Supreme Court to reopen, rehear or reexamine, if necessary, to reverse or set aside a judgment given in an appeal already heard and disposed of by it. So, to construe, would indeed not only be contrary to the clear meaning to the words used in s 69 but also contrary to art 128(1) of the Federal Constitution. ...

With respect to appeals, s 41 of the Act provides that appeals shall be decided in accordance with the opinion of the majority of judges composing the court. Read in the light of s 67(1), the jurisdiction of the Supreme Court in regard to civil appeals shall specifically be to hear an appeal from any judgment or order of any High Court. There is certainly no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of.

- A** Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to reopen, rehear and reexamine its decision for whatever purpose. The only exception where there can be a rehearing is only to the extent provided by s 42, in particular sub-s (3) of s 42. The other exception is as provided under s 44 sub-s (3) to the effect that every order such as that envisaged in sub-s (1) of s 44 may be discharged or varied by the full court.
- B**

Reference has also been made to the Court of Appeal case of *Tai Chai Yu v The Chief Registrar of The Federal Court* [1998] 2 MLJ 474 which has approved the propositions enunciated in *Lye Thai Sang*.

- C** In rebuttal, counsel for the applicant takes the view that *Lye Thai Sang* was decided per incuriam. What is per incuriam had been aptly explained by Sir John Donaldson MR in *Duke v Reliance Systems Ltd* [1987] 2 WLR 1225 when he said at p 1228:

- D** I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case, it has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it *might* have reached a different conclusion. That appears to me to be position at which we have arrived today.
- E** (Emphasis added.)

- Counsel submits that the Federal Court in Malaysia can set aside its own judgments and orders in limited circumstances in the exercise of its inherent jurisdiction. It is his contention that the Federal Court, as the apex court in the country, has the inherent jurisdiction to prevent any abuse of its own process or any injustice. Here, he draws attention to art 121(2) of the Constitution which stipulates:
- F**

- There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:
- G**
- (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
 - (b) such original or consultative jurisdiction as is specified in arts 128 and 130 of the Constitution; and
 - (c) such other jurisdiction as may be conferred by or under Federal Law.

- H** In placing particular emphasis on cl (c) above, counsel refers to the Civil Law Act 1956 as coming within the ambit of 'Federal Law' stated therein. He draws particular attention to s 3(1)(a) of the Civil Law Act 1956 under the heading 'Application of UK Common Law, Rules of Equity and Certain Statutes.' Subsection (1)(a) states:

- I** Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall —
- (a) in West Malaysia or part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956 ...

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.

A

In this connection, counsel argues that in 1956, the common law of England clearly recognized the superior courts as having inherent jurisdiction to prevent injustice and/or abuse of its process (see *Halsbury's Laws of England* (4th Ed) Vol 37 at para 14). According to him, the Supreme Court in *Lye Thai Sang* did not address itself to the import of the Civil Law Act 1956, in particular s 3(1)(a) aforesaid.

B

Now, several cases were cited to demonstrate the limited circumstances in which the English courts had exercised their inherent jurisdiction where, for instance, the judgment had been obtained by fraud or suppression of material evidence (see *Re Barrel Enterprises* [1972] 3 All ER 631; *Bright & Co v Sellar* [1904] 1 KB 6; *Re Scott & Alvarez Contracts* [1895] 1 Ch 596; *Boswell & Coak (No 2)* (1902) 96 LTR 365). (See also the Malaysian cases of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 and *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143).

C

D

Inherent jurisdiction

Let me say without more that whilst I agree with the applicant's counsel's contention that the Federal Court has inherent jurisdiction under the common law to review its previous decision, I am however unable to accept his stand that *Lye Thai Sang* was decided per incuriam. I agree entirely with the view expressed by the Supreme Court in *Lye Thai Sang* that s 69(4) of the CJA could not be construed to confer an unlimited power on the supreme Court to review an earlier decision in an appeal which had already been heard and disposed of and therefore, in that context, the Supreme Court had no power to reopen, rehear and reexamine its previous decision for whatever purpose. Quite clearly, that observation was made in the context of the proper construction to be placed on s 69(4) of the CJA. But that cannot be read to mean that the Supreme Court had been deprived of its inherent jurisdiction derived under the common law by virtue of s 3(1)(a) of the Civil Law Act 1956, read with art 121(2) of the Constitution. This is the common law exception quite apart from the statutory exceptions referred to in *Lye Thai Sang*. In any event, the Federal Court has now been conferred with inherent power under r 137 of the Rules of the Federal Court 1995. This had also been reiterated very recently by the Federal Court in the case of *Chia Yan Teck & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 wherein Mohamed Dzaiddin Chief Justice said at p 10:

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Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice.

For the reasons stated, I hold the view that the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to reopen, rehear and reexamine its previous judgment,

I

A decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. In the circumstances, the preliminary objection raised by counsel for the respondent fails.

B *Whether Federal Court properly constituted*

C I now come to the first issue advanced by the applicant, ie that the decision of the Federal Court dated 12 July 2000 was invalid as it was delivered by an improperly constituted court. Here, counsel for the applicant has contended that at the time of the delivery of the decision, one of the panel judges had retired and this had the effect of vitiating the validity of that decision. He cites in support, the Indian case of *Surendra Singh v State of Uttar Pradesh* AIR 1954 SC 194, in particular the following passages therein which state at pp 196–197:

D In our opinion, a judgment within the meaning of these sections is the final decision of the court intimated to the parties and to the world at large by formal ‘pronouncement’ or ‘delivery’ in open court. It is a judicial act which must be performed in a judicial way ...

E An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery as that is not the essence, except to say that it must be done in a judicial way in open court. But however it is done, it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything up till then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. that is what constitutes the ‘judgment’.

G Now up to the moment the judgment is delivered, judges have the right to change their mind. There is a sort of ‘*locus paenitentiae*’ and indeed last minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the court. Only then does it crystallize into a full fledged judgment and become operative. It follows that the judge who ‘delivers’ the judgment or causes it to be delivered by a brother judge, must be in existence as a member of court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views, it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery.

But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A judge's responsibility is heavy and when a man's life and liberty hang upon his decision, nothing can be left to chance or doubt or conjecture; also a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometime a signed draft, to a brother judge who also heard the case. This may be merely for his information of for his consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light drawn upon him before delivery of judgment.

In my view, these sentiments and observations expressed by the Indian Supreme Court have great persuasive force. Given those observations, what is the position in the case at hand? Here, it is not disputed that at the time of the delivery or pronouncement of the decision of the Federal Court on 12 July 2000, two of the three judges forming the panel were still in service. It may be noted here that the panel consisted of Eusoff Chin Chief Justice (the presiding judge), Wan Adnan CJ (Malaya) and Chong Siew Fai CJ (Sabah and Sarawak). The judgment was written by the presiding judge and the other two panel members agreed with it. However, at the time when the judgment was read out in open court by the SAR, Chong Siew Fai CJ (Sabah and Sarawak) had retired. Only Eusoff Chin Chief Justice and Wan Adnan CJ (Malaya) were still in service.

Section 78 of the Courts of Judicature Act 1964

In this connection, counsel for the applicant has taken a two pronged approach. First he argues that s 78 of the CJA, does not apply as it does not envisage a situation where a judge hearing the appeal is no longer a judge by reason of retirement or death or dismissal at the time when the decision is delivered or pronounced. Section 78 of the CJA reads as follows:

- (1) If, in the course of any proceeding or in the case of a reserved judgment at any time before delivery of the judgment, any judge of the court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a judge of that court, the hearing of the proceeding shall, ... continue before, and judgment or reserved judgment, as the case may be, shall be given by the remaining judges of the court, not being less than two, and the court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the judge as aforesaid.
- (2) In any such case, as is mentioned in sub-s (1), the proceeding shall be determined in accordance with the opinion of the majority of the remaining judges of the court, and, if there is no majority, the proceeding shall be reheard.

In this regard, counsel attempts to draw a comparison with s 9 of the CJA. In his written submission on p 17, this is what he states:

- A** This provision (prior to amendment) was considered by the tribunal which sat in judgment on Supreme Court Judges in 1988 and 1989 (Vol III, case 19). Their views are found at xcic and c of the report. It was held that the words 'Unable ... owing to illness or absence from Malaysia or any other cause' referred primarily to causes such as bodily infirmity and other physical causes, but that a consideration of the Constitution revealed that vacancy must have been considered. The section has subsequently been amended. The conclusion must be that in the absence of specific words covering a vacancy, that contingency cannot be within the contemplation of s 78.
- B**

With respect, I do not see the rationality of this proposition. In any event, it does not help the applicant's case because counsel's use of the word 'primarily' would seem to suggest that the ailments referred to were not restricted entirely to bodily infirmity and other physical causes. In my view, the words in s 78 are clear enough. The term 'any other cause' must necessarily cover a situation where a judge has retired. To construe otherwise would create an absurdity. That could not have been the intention of Parliament. The first approach taken by the applicant holds no water.

- C**
- D** The second approach canvassed by counsel for the applicant is in the alternative. This appears on p 17 of his written submission which reads:

- Further, even if s 78 applies to a vacancy in office, this does not relate to the applicant's rights. Section 78 was amended in July 1998. Prior to the amendment, the consent of the parties was required if two judges were to act when the third was unable to act. The applicant obtained leave to appeal on 17 July 1995 and the appeal was heard on 12 January 1998 and 13 January 1998. The applicant thus had a substantive right to have three judges on board until the judgment was delivered and should have been asked to consent to judgment being delivered when the third judge was unable to act.
- E**

- This argument tends to suggest that s 78 of the CJA, which existed prior to its amendment of 1 August 1998 should apply given the factual circumstances involved, and therefore consent of the applicant was required at the time judgment was delivered.
- F**

Now, the old s 78 of the CJA states:

- G** (1) If, in the course of any proceeding or in the case of a reserved judgment at any time before delivery of the judgment, any judge of the court hearing the proceeding is unable, though illness or any other cause, to attend the proceeding or otherwise exercise his functions as a judge or that court, the hearing of the proceeding shall, *if the parties consent*, continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining judges of the court, not being less than two, and the court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the judge as aforesaid.
- H**
- (2) In any such case as is mentioned in sub-s (1), the proceeding shall be determined in accordance with the opinion of the majority of the remaining judges of the court, and, if there is no majority, the proceeding shall be reheard.
- I**
- (3) *If the parties do not consent as aforesaid, the appeal shall be reheard.* (Emphasis added.)

By virtue of the Courts of Judicature (Amendment) Act 1998, s 6 thereof, the words 'if the parties consent' were deleted, as was the entire sub-s (3) above. That being the case, the next relevant question to consider is whether the amendment has removed a substantive right or a procedural right. If it is a substantive right, then quite obviously, the amendment cannot have retrospective effect save by clear and express words. If it is procedural, then retrospectivity applies unless otherwise stated in the statute concerned. Counsel for the applicant has contended that it is a substantive right. I agree with him. Consequently, the amended s 78 has no retrospective effect. In this case, I think it is important to note the actual words used in the old s 78. Reading the provisions of that section as a whole, it does seem to me that the need for consent of the parties is confined to the continued hearing as opposed to the concluded hearing of a proceeding before the remaining panel of judges. This much is clear from the words used in the phrase 'the hearing of the proceeding shall, if the parties consent, continue before ... the remaining judges of the court, not being less than two ...'. Ordinarily, to 'hear' a cause or matter means to hear and determine it unless there is something which, by natural intendment or otherwise, would cut down that meaning. However a contextual approach has to be adopted in this case. If the legislature had intended the ordinary meaning of the word 'hearing' in the old s 78(1) to prevail, it would not have been necessary to include the succeeding words 'and judgment or reserved judgment, as the case may be, shall be given by ...'. The inclusion of such words in the manner expressed therein must clearly mean that the determination factor constituting the judgment or reserved judgment is not a matter for which consent of the parties need to be sought. Thus, on a proper construction, it must necessarily mean that where the actual hearing of a case is still continuing at the time of the inability of any judge, either through illness or any other cause, consent of the parties is required before the said hearing can be continued or proceeded with. Here, however, the hearing of the case had already been concluded or completed pending judgment or reserved judgment at the time of the said inability, no consent is needed. Such a construction, even if its result be viewed as unjust or unpalatable, must prevail given the role of the courts as expressed in the dictum by Tun Suffian LP in *PP v Sihabudin bin Haji Salleh & Anor* [1980] 2 MLJ 273 when he said at p 275:

To paraphrase the words of Lord Diplock at p 541 in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, the role of the judiciary is confined to ascertaining from the words that the law maker has approved as expressing its intention what that intention was, and giving effect to it. Where the meaning or the words is plain and unambiguous, it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral; or to paraphrase the words of Lord Scarman at p 551 in the same case, in the field of statute law, the judge must be obedient to the will of the law maker as expressed in its enactments — the judge has power of choice where differing constructions are possible, but he must choose the construction which his judgment best meets the legislative purpose of the enactment. Even if the result is unjust but inevitable, he must

- A** not deny the statute: unpalatable statute law may not be disregarded or rejected simply because it is unpalatable; the judge's duty is to interpret and apply it.

- B** It is the light of the construction which I take that the factual matrix of this case has to be examined and considered. Here, there was an appeal before the Federal Court. It was heard by a panel of three judges. Hearing of the appeal concluded on 13 January 1998. Judgment was reserved. Thereafter, one of the panel members, ie Chong Siew Fai CJ (Sabah and Sarawak) retired from the judiciary. Shortly after, the reserved judgment was pronounced by the remaining panel members. From these facts, it is clear that the actual hearing of the appeal had concluded pending reserved judgment before the retirement of Chong Siew Fai (Sabah and Sarawak).
- C** As such, no consent of the parties needed to be sought. The situation would have been different if at the time of the retirement of Chong Siew Fai (Sabah and Sarawak), the hearing of the appeal had yet to be concluded. Consent of the parties would be required to continue the hearing of the appeal. Given the factual circumstances as disclosed herein, I hold that the applicant could not hope to take advantage of the substantive right of consent under the old s 78. It did not arise in the present case.
- D**

Section 78 a contingency provision

- E** In any event, I take the view that s 78 is essentially a contingency provision. It provides for a contingency to wit, inability of a judge, through illness or any other cause, to attend proceedings, or otherwise exercise his judicial functions. It comes into play only when the contingency occurs. This is reflected, albeit implicitly, from the two recent Federal Court cases of *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 and *Chia Yan Teck*.

- F** In the instant case, the contingency occurs on 4 July 2000 when Chong Siew Fai (Sabah and Sarawak) retired. At the time, the new s 78 applied. The right to consent provided under the old s 78 did not apply. It is not disputed that at the time when Chong Siew Fai CJ (Sabah and Sarawak) retired, there were two other panel members still in office, ie Eusoff Chin Chief Justice and Wan Adnan CJ (Malaya). That being so, the amended s 78(1) is clearly applicable because it specifically provides that the reserved judgment shall be given by the remaining judges not being less than two. Here, the reserved judgment was delivered on 12 July 2000 when both of the remaining judges were still in office. I therefore find no merit in the second approach propagated by counsel for the applicant. For the reasons stated, I hold the view that the Federal Court was properly constituted at the time the reserved judgment was delivered. That judgment is therefore not vitiated.
- G**
- H**

The issue of waiver

- I** In the course of his submission, counsel for the respondent raised the issue of waiver on the part of the applicant. This, I think, is a point worthy of consideration. This complaint is premised on the following factual

circumstances: that the applicant, from the date judgment was reserved by the Federal Court on 13 January 1998 to the date of delivery of the said judgment on 12 July 2000, had taken 30 months to make the application to disqualify Eusoff Chin Chief Justice; that the application to disqualify was made some seven months after the judgment was delivered, making it a total of about 37 months of inactivity, and that the applicant had admitted that the facts giving rise to an apprehension of bias on the part of Eusoff Chin Chief Justice arose during the course of hearing. The applicant offered two main reasons for the delay, namely:

- (a) that he did not have full knowledge of the facts or circumstances giving rise to grounds of apparent bias on the part of Eusoff Chin Chief Justice; and
- (b) that he did not have knowledge of his right to object or challenge the court's decision.

Counsel for the applicant submits, in effect, that there are justifiable grounds for the delay.

It is clear that all the information relating to Eusoff Chin Chief Justice which formed the basis of the applicant's complaint was available to him during the interim period between the date the judgment was reserved and the date of its pronouncement or delivery by the Federal Court. There was a lapse of about 30 months. The applicant did not rely on information coming to light after the judgment was delivered. In the circumstances, the applicant's allegation that he did not have full knowledge of the facts giving rise to the complaint cannot be true.

It is not disputed that the applicant had intended, at the onset of the appeal before the Federal Court, to challenge the qualification of Eusoff Chin Chief Justice on the basis of certain photographs but was advised against it by his counsel Mr Karpal Singh, apparently on grounds of insufficient merit. Given this development, it is certainly strange for the applicant to subsequently allege that he did not have knowledge of the right to object or challenge on the matter of the disqualification of Eusoff Chin Chief Justice. In any event, at all material times, the applicant was defended by able counsel. Even if he did not personally know of his right to challenge, he would surely have been advised of such a right by counsel. In the circumstances, I find no truth in his allegation aforesaid.

It is also significant to note that the applicant took another seven to eight months to file the instant application to set aside the decision of the Federal Court. His explanation for the delay was that he was unable to get any solicitors to take up the matter given the repressive tendency apparent at the material time. He cited the repression to included the prevalence of contempt proceedings being made not only against certain parties but also their counsel involved. I find this explanation difficult to comprehend. In my view, even given the perception of repression, the applicant might have had, I am still unable to accept such an irrational explanation. Without recounting names, I would say that there were at lease half a dozen lawyers in the country who would not have hesitated to take up the challenge.

A In *Auckland Casino Ltd v Casino Central Authority* [1995] 1 NZLR 142, the appellant continued as a participant at the hearing despite having knowledge of matters that pointed to bias on the part of the respondent. It was held that this had the effect of scuttling the appellant's attempt to raise bias as an issue for judicial review on the ground of waiver. I find the following passage in the judgment particularly instructive:

B

A fair summation appears to us to be that, having spent some millions of dollars ... in costs of the application, the appellant decided to press on as a participant in the hearing, without raising the bias objections which were later made central to the third and fourth cause of action — thus deliberately taking the chance of the result before the authority and reserving, as far as possible, any challenge on the ground of bias unless and until there was an adverse decision from the authority. Factors influencing this election included fear of alienating the authority and fear of public opinion. We accept that there was a real dilemma and confess to some sympathy with the appellant. The fact remains that the dilemma was resolved by inaction.

C

D The English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd and other appeals* [2000] 1 All ER 65 also dealt with waiver as one of several issues before it. Certain observations are particularly poignant to our case. They read at p 82:

E

When, on day eight of the hearing, the deputy judge made the disclosure recorded in the transcript, Mrs Emmanuel could then have made an objection to the deputy judge continuing to hear the case. Or she could have asked for time to consider the position. She did neither but allowed the hearing to continue to a conclusion. She could, after the Hawks Hill hearing had come to an end, have objected to the deputy judge hearing the Hans House appeal. She did not do so, and without objection, she heard the appeal, the reserved judgment was delivered, no bias objection was made. An inference that might be drawn is that Mrs Emmanuel wanted to await the results of the two hearings, and only made her bias objection when she knew she had lost. So the question arises whether she must be taken to have waived any bias objection.

F

Thereafter, the court came to the following conclusions at p 87:

G

In our judgment, Mrs Emmanuel and her lawyers had to decide ... what they wanted to do. They could have asked for time to consider the position. They could have asked the deputy judge to recuse himself and order the proceedings to be started again before another judge. They could have told the judge they had no objection to him continuing with the hearing. In the event, they did nothing. In doing nothing they were treating the disclosure as being of no importance. The hearing then continued for a further seven days, judgment was reserved, the Hans House appeal was heard, judgment was reserved and judgment in both cases was given three and a half months later. During all this period, Mrs Emmanuel and her lawyers did nothing about the disclosure that had been made. ... They only sprung into action and began complaining about bias after learning ... that Mrs Emmanuel had lost ... It was not open to Mrs Emmanuel to wait and see how her claims in the *Locabail* litigation turned out before pursuing her complaint of bias ... [she] wanted to have the best of both worlds. The law will not allow her to do so.

H

I

In my view, the factual matrix in *Locabail* is not entirely dissimilar from our case. Here, the applicant had knowledge of all matters grounding his complaint of bias before judgment was delivered. He had ample time and opportunity to take the appropriate action. He did nothing. He waited until judgment was delivered months later. Taking the cue from the Court of Appeal in *Locabail*, he only ‘sprung into action’ and decided to complain about bias after he had lost the appeal. If he had not lost, it is quite certain that he would not have filed the motion. He wanted the best of both worlds. That, the law will not allow. The doctrine of waiver has militated firmly against him. It has acted as a bulwark against what can suitably be called an afterthought action. In my view, such conduct would have a contagious and adverse effect upon the veracity of the applicant’s complaint of apparent bias against Eusoff Chin Chief Justice thereby rendering the second ground advanced by him to be of little value, if any.

Siti Norma Yaakob FCJ: There are three notices of motion filed by the parties before us:

- (1) by the applicant, dated 23 February 2001, to set aside an order of this court dated 12 July 2000 (‘the principal application’);
- (2) by the respondent, dated 30 March 2001, to set aside the principal application;
- (3) by the applicant, dated 4 April 2001, to amend three of his documents.

Application (2) above points in part to a number of irregularities appearing on the face of some of the applicant’s documents in the principal application and this had prompted the applicant to file his application to amend the very same documents which the respondent claims to be irregular. Since the two applications are somewhat related at least in part, we had, with the consent of all parties, heard the arguments on the motion to amend first. By this motion, which is procedural in nature, the applicant seeks to amend:

- (1) his notice of change of solicitors dated 23 March 2001;
- (2) his notice of motion dated 23 February 2001, relating to the principal application; and
- (3) his affidavit in support of the principal application dated 22 February 2001.

It is the applicant’s contention that the civil appeal number as stated in the intulment of the first document, as well as that stated in the other two documents, has been wrongly numbered and that the stated Civil Appeal No 02–6–95(W) be substituted by the correct Civil Appeal No 02–5–95(W) in all three documents.

The applicant explained that there was some confusion in the numbering and that it arose in the following manner.

Together with six others, the applicant was sued by the respondent for defamation and conspiracy to defame in Kuala Lumpur High Court Civil Suit No S5–23–23–94. The allegations of defamation and conspiracy to

A defame relate to four articles that appeared in a monthly magazine. On 22 October 1994, the High Court found the applicant and his six co-defendants liable and separate awards were made against each of them for general and aggravated damages.

B The applicant and another co-defendant, Ling Wah Press Sdn Bhd, filed separate notices of appeal to the Court of Appeal, as did two other co-defendants who filed a joint notice, challenging the findings of liability and quantum. The Court of Appeal heard all three appeals together and on 18 April 1995, dismissed them.

C The applicant and his three co-defendants took the matter further and they made separate applications for leave to appeal to this court and on 17 July 1995, such leave was granted.

It was pursuant to such leave that the applicant and Ling Wah Press Sdn Bhd, who were represented by different solicitors, filed separate notices of appeal to this court and separate civil appeal numbers were given to the proceedings filed by them.

D Civil Appeal No 02-5-95(W) was allotted to the appeal filed by the applicant and Civil Appeal No 02-6-95(W) to the appeal filed by Ling Wah Press Sdn Bhd. Clearly the applicant's three documents sought to be amended stated the wrong civil appeal number when they cited Civil Appeal No 02-6-95(W), and it is to correct this wrong that the application to amend was made.

E Nonetheless, there was strong objection to the amendments as the respondent maintained that the applicant had:

- (1) delayed in the making of the application and no reason was given for such a delay;
- F** (2) tampered and altered the figure '6' to read '5' in the notice of motion and affidavit in support, and to that end the two documents had been falsified for which reports had been lodged with the police and the Anti Corruption Agency;
- (3) bad faith or there has been mala fide as the application to amend was only made after the respondent had filed his application to set aside the principal application.

G

From the affidavit evidence and the contemporaneous documents, there is no doubt that the applicant had cited the wrong civil appeal number in the three documents. Civil Appeal No 02-6-95(W) relates to the appeal filed by Ling Wah Press Sdn Bhd, the applicant's co-defendant in the defamation suit and which incidently was struck out by this court when the representatives of Ling Wah Press Sdn Bhd failed to appear.

H

Clearly, what the application to amend seeks to do is to correct an erroneous civil appeal number appearing in the three documents. The proposed amendments go no further beyond that. As such, the allegations of misconduct on the part of the applicant that he had delayed in seeking to amend, tampered and altered the civil suit number in his pleadings and possessed bad faith in making the application seem out of context and

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appear to be misplaced. This is more so when the proposed amendments seek no more than to correct a defect in the pleadings, and provided that such amendments:

- (i) do not change the character of the dispute into another and inconsistent character;
- (ii) are made bona fide on the part of the applicant; and
- (iii) cause no prejudice to the respondent which cannot be compensated in costs.

Such amendments are normally always allowed in law, see the cases of *Looi Guan Kway v Low Lean Bok & Ors* [1939] MLJ 224 and *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213.

Since the application to amend in these proceedings before us fulfills the three criteria as stated above, we had exercised our discretion and allowed the applicant's motion to amend but awarded the costs of the application to the respondent.

That left us with the remaining principal application by the applicant and the respondent's application to have it set aside on grounds other than those given for objecting to the application to amend. With the consent of the parties, we heard both applications together as they refer to the same subject matter.

Three issues were raised by the parties in support of their respective application:

- (1) whether this court has any inherent jurisdiction to entertain the principal application to set aside its previous order dated 12 July 2000;
- (2) whether the three member panel of this court that delivered its decision on 12 July 2000 had been properly constituted;
- (3) whether the decision delivered on 12 July 2000 has been tainted by the apparent bias on the part of the presiding judge.

To appreciate the first issue, I need to go back and trace the conduct of the proceedings of Kuala Lumpur Civil Suit No S5-23-23-94 in so far as they relate to the applicant. As I have stated earlier, he was sued by the respondent for defamation and conspiracy to defame. On 22 October 1994, Mokhtar Sidin J found the applicant liable and a judgment for RM2m was entered against him. He appealed to the Court of Appeal and on 18 April 1995, his appeal was dismissed with costs. On 17 July 1995, leave to appeal was granted by this court against the dismissal of his appeal by the Court of Appeal.

The three member panel of this court comprising of Eusoff Chin Chief Justice, Wan Adnan CJ (Malaya) and Chong Siew Fai CJ (Sabah and Sarawak) heard the applicant's appeal on 12 and 13 January 1998, and judgment was reserved. On 12 July 2000, the court delivered its judgment and dismissed the applicant's appeal with costs. The issue raised is whether this court has the inherent jurisdiction to set aside its own judgment pronounced on 12 July 2000.

A On this jurisdictional issue, the respondent contended that we do not have the inherent power to set aside the impugned judgment as art 128 of the Constitution that sets out our original jurisdiction and s 96 of the CJA that governs our appellate jurisdiction limit our powers to what have been stated by the provisions contained in the two statutes, and those provisions do not include the power to review an earlier decision in an appeal that has already been heard and disposed of. As authority, he relied heavily on the case of *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166, where the then Supreme Court held that it ‘has no power to review the case, that is, to reopen, rehear and reexamine its decision for whatever purpose’.

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C In rebuttal, the applicant submitted that *Lye Thai Sang* was decided per incuriam as the Supreme Court took a narrow and restrictive interpretation of particular sections of the CJA pertaining to jurisdiction and failed to consider the provisions of s 3(1)(a) of the Civil Law Act 1956, that imports English common law and equity as administered in England on 7 April 1956, into our judicial system and art 121(2)(c) of the Constitution that extends our jurisdiction to those that may be conferred by or under any other federal law. The contention of the applicant is that had the inherent jurisdiction of the English courts, as dictated by the common law of England, been imported into the case and O 92 r 4 of the Rules of the High Court 1980, that provides for inherent jurisdiction, been considered, *Lye Thai Sang* would have been decided differently.

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The crux of the issue on jurisdiction lies in whether this court has the inherent power to entertain the application to set aside the judgment dated 12 July 2000. This is quite unlike the situation in *Lye Thai Sang*, where the applicants in that case sought to review, ie to reopen, rehear and reexamine an earlier decision reached by the Supreme Court. It would appear that the application before the Supreme Court was more in the nature of an appeal against a decision it had already given in an appeal it had heard and disposed of. The same situation does not arise before us as what we are asked to determine is on the threshold question as to whether jurisdiction lies to entertain an application to set aside a previous judgment or order.

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G The jurisdiction to entertain an application like the applicant’s has now been settled by a recent decision of this court in the case of *Chia Yan Tek*, where Mohamed Dzaiddin Chief Justice, held at p 10 that:

H Rule 137 of the Rules clearly gives the inherent powers to hear an application or to make any order as may be necessary to prevent injustice. The issue of reopening or reviewing our own decision in this instant case therefore does not arise.

Rule 137 of the Rules of the Federal Court 1995, referred to in that case, contains the following provisions:

I For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

That being so, it is now incumbent upon us to determine whether any injustice has been done to the applicant or whether an abuse of the process of court has been committed as to warrant the success or otherwise of the principal application. This is a question of law and must depend on the determination of either one of the remaining two issues raised by the parties, the first of which is whether the three member panel of this court that delivered its judgment on 12 July 2000 has been properly constituted.

It is common ground that when the judgment was delivered on 12 July 2000, it was pronounced in open court by the SAR reading out a unanimous decision from a judgment written by Eusoff Chin Chief Justice, the presiding judge. It is also not disputed that as at the date of the judgment, a member of the panel, Chong Siew Fai CJ (Sabah and Sarawak), had retired from the Bench nine days earlier on 3 July 2000.

The applicant contends that under such circumstances, the court was unconstitutional and consequently, its decision pronounced on 12 July 2000 is invalid.

In response, the respondent takes the stand that the validity of the judgment cannot be questioned for just before he retired, Chong Siew Fai CJ (Sabah and Sarawak), had by a letter dated 30 June 2000, indicated his approval to the judgment prepared by the presiding judge and such approval was also notified to the other member of the panel, and as such, he had made his decision known on 30 June 2000, before he retired.

He may well have done so, but his decision is only known to his brother judges. Under such circumstances, I consider that a more appropriate approach is to ascertain when the judgment becomes effective for it is at the effective date that one looks to consider the adequacy in the composition of the court. The effective date of a judgment has now been settled in the case of *Chia Yan Tek* where in adopting the reasonings of the Indian Supreme Court in *Surendra Singh & Ors v State of Uttar Pradesh* AIR 1954 SC 194, Mohamed Dzaiddin Chief Justice, held that the effective date of any judgment is the date of its pronouncement in open court and not any other earlier acts aimed at arriving at a decision.

In this case, there were only two judges remaining on 12 July 2000 who were capable of functioning as judges of that court, the third having retired before that date. Under such circumstances, both parties agree that if there is to be any saving, it can only be done under s 78 of the CJA. That is as far as their agreement goes, for whilst the respondent relies on the current and amended s 78 to say that the judgment is valid, the applicant takes the position that firstly, s 78 is not applicable and secondly, whatever right that he had acquired under the original s 78 cannot be taken away by the amendments, and relying solely on his vested right as contained in the provisions of the original s 78, the applicant maintains the judgment to be invalid as the court was not properly constituted.

Under s 74(1) of the CJA, every proceeding in the Federal Court shall be heard and disposed of by a minimum of three judges. However s 78 governs the situation where proceedings are continued in the absence of a judge and

A in substance, I reproduce the relevant portions of its provisions in so far as they relate to the facts of our case:

- B**
- (1) If ... in the case of a reserved judgment, at any time before delivery of the judgment, any judge of the court hearing the case is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a judge of that court ... reserved judgment ... shall be given by the remaining judges of the court, not being less than two, and the court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the judge as aforesaid.
- C**
- (2) In any such case as is mentioned in sub-s (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining judges of the court, and if there is no majority the proceedings shall be reheard.

D The aforesaid provisions are the current provisions of s 78 as amended by the Courts of Judicature (Amendment) Act 1998, which came into force on 1 August 1998.

The first objection taken by the applicant is that s 78, as amended, is not applicable as it does not contain any provision regulating the situation where a judge can no longer function as one by reason of his retirement, death or dismissal.

E I see no merit to this objection as the relevant provisions of s 78, both in its original and amended forms, specifying the reasons for the absence of a judge are wide enough to include a judge who has retired, died or dismissed. This is clear from the words 'any other cause' appearing in the phrase 'unable through illness or any other cause to attend the hearing or otherwise exercise his function of a judge of the court'. Those words admit to the interpretation that the other reasons why the absent judge cannot function as one may well be due to his retirement, death or dismissal.

Perhaps the applicant stands on firmer ground when he contended that whatever rights he had acquired under the original s 78 cannot be taken away by the amendments.

G Previous to 1 August 1998, there was the requirement that before delivery of a reserved judgment in the situation envisaged by s 78, the court needed to seek the consent of the parties before the judgment is pronounced, and in the absence of such a consent, the appeal shall be reheard. Since the principal and the respondent's applications were filed after the delivery of the reserved judgment, that is after the amendments became effective, the applicant contended that the amendments cannot take away his vested right of being heard and his case determined by the three member panel, but in the absence of one of them, such right is to be determined by the law applicable at the date of the institution of his appeal, and not by the law applicable at the date of the decision. The law applicable at the time his appeal was filed was that in the absence of one of the three judges who heard his appeal, it becomes mandatory that the parties consent to the proceedings being continued with the remaining two judges, and

since this was not done, the judgment that was pronounced on 12 July 2000 was ineffective and invalid as the court was not properly constituted.

The respondent refuted such a contention on the ground that the requirement of consent that was taken away by the amendments was only procedural in nature, and as such there is no question of the applicant having acquired any vested right under the unamended section.

Under these circumstances, the pertinent question to ask is whether the amendments affected rights or procedure as it is now settled that unless there is a clear indication to the contrary, such amendments are prospective if they affect substantial rights but retrospective if they affect procedure, see the Privy Council decision in the case of *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1.

Whilst it is true to say that s 78, both in its original and amended forms, regulates the procedure to be followed when a judge is absent, the pre amendment requirement that the parties give their consent to the remaining two judges to proceed with the hearing and pronounce a judgment, is, I consider, very much a substantive right. This is so as at the time of the commencement of the applicant's appeal, arguments were heard by a three member panel and there is that expectation that the same three member panel will arrive at a decision based on what was presented before it. However, in the absence of one member of the panel, proceedings may still continue but subject to the parties consenting to the remaining two members of the panel bringing the hearing to a conclusion, and any decision reached must be a majority one. Under these circumstances, the parties are vested with the right to control the proceedings of a hearing for without their consent, the applicant's appeal has to be ventilated afresh before another panel. I hold that the applicant's entitlement to control the proceedings constitutes an interest that accrued at the commencement of his appeal and, which I say, is protected by s 30(1)(b) of the Interpretation Acts 1948 and 1967, which states that the repeal of a written law in whole or in part shall not affect any right, accrued or incurred under the repealed law. Hence, the issue here is not so much on the composition of the panel hearing the appeal but more so on the deprivation of a substantive right that had accrued to the applicant.

Since the applicant's accrued interest has been violated in this case leading to a miscarriage of justice, it follows that he is entitled to have his appeal reheard before another panel of this court.

On the issue of bias, I concur with the reasons given by my brother, the learned Chief Judge, that bias merits no consideration in these applications before us.

Since a division of this court that delivered the judgment on 12 July 2000 had not accorded the applicant his substantive right to consent to the judgment being delivered by the remaining two members of the panel — a right that was not taken away by the amendment to s 78 of the CJA, it follows that the reserved judgment was delivered in breach of the applicant's substantive right, and to that end, the reserved judgment is hereby set aside. On that finding, the principal application is allowed whilst the respondent's

A application is dismissed. Although there are two applications before us, there will be one set of costs as both applications relate to the same dispute and such, costs will be paid by the respondent to the applicant in any event. Finally, the deposit made by the applicant is to be refunded to him whilst that of the respondent be paid out to the applicant to account of his taxed costs.

B **Haidar FCJ:** There are three applications by way of motions filed by the parties before us. They are:

(1) by the applicant, dated 23 February 2001, to set aside the order of this court dated 12 July 2000;

C (2) by the respondent, dated 20 March 2001, to set aside the application by the applicant dated 23 February 2001;

(3) by the applicant, dated 4 April 2001, to amend three of his documents.

D By consent of the parties, we heard the application dated 4 April 2001 to amend first. There was strong objection to the application by the respondent. After hearing the parties, we allowed the application but ordered the costs to the respondent in any event. The reasons are sufficiently set out by Siti Norma Yaakob FCJ in her judgment, and I have nothing further to add.

E That left us with the application of the applicant dated 23 February 2001 and the application of the respondent dated 20 March 2001 (other than those given for objecting to the application to amend). We heard the two applications together as agreed by the parties.

The applicant relied essentially on two grounds:

F (1) that the judgment was invalid as it was delivered by an improperly constituted court; and

(2) that the judgment was tainted by an apparent bias on the part of the presiding judge.

G The respondent raised a jurisdictional point, that is, whether this court can reopen, rehear and reexamine its own order dated 12 July 2000 and set it aside.

For the reasons stated by the learned Chief Judge, I agree there are no merits in respect of ground (2). That leaves ground (1) as well as the jurisdictional issue for consideration. I will consider both issues together.

H On the facts, the central issue for consideration is the effect of the amendment to s 78 of the CJA by the Courts of Judicature (Amendment) Act 1998 (Act A1013) which came into force on 1 August 1998, that is, whether the said amendment is retrospective. I say so because the reserved judgment was delivered after the amendment and the constitutionality of the court is really not an issue as there were still two remaining judges of the court when the reserved judgment was delivered. I will touch on this issue later in the judgment.

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The relevant question is whether the amendment takes the form of a substantive right or a procedural right. In other words, has the amendment removed the substantive right or the procedural right of the applicant?

The facts can be shortly stated as follows.

The applicant's appeal was heard by a three member panel comprising Eusoff Chin Chief Justice, Wan Adnan CJ (Malaya) and Chong Siew Fai CJ (Sabah and Sarawak) on 12 and 13 January 1998 and judgment was reserved. The court delivered a written judgment on 12 July 2000 read by the SAR. There was only one judgment of the court and it was written by Eusoff Chin Chief Justice, the presiding judge. The judgment was a unanimous one. However, at the time of the delivery of the judgment, Chong Siew Fai CJ (Sabah and Sarawak) a member of the panel, had retired from the Bench nine days earlier, on 3 July 2000. It is not disputed that before his retirement Chong Siew Fai CJ (Sabah and Sarawak), had by letter dated 30 June 2000 indicated his approval to the written judgment of the presiding judge and such approval was also notified to the other member of the panel, Wan Adnan CJ (Malaya), who also signified his approval.

What needs to be considered first is when the effective date of a judgment is. This court in *Chia Yan Tek* had the occasion to consider the effective date of a judgment, that is, is it the date of giving the judgment or the pronouncement of the judgment in open court? In holding that the effective date of the judgment in the said case is the date of pronouncement in open court, and not the date when it was signed by the remaining two judges of the court, Mohamed Dzaiddin Chief Justice, said at pp 8–9:

The primary question for decision is the effective date of the judgment. Is it the date of giving the judgment or the pronouncement of the judgment in open court?

In my opinion, there is a clear distinction between the giving of judgment under s 78 of the Act and the pronouncement of the said judgment in r 63 of the Rules. Section 78 of the Act provides that the judgment or reserved judgment shall be given by the remaining judges of the court, not being less than two, and in which case, the court shall be deemed to be duly constituted. This begs the question: when is the judgment of the remaining judges given? The section does not provide the manner in which the time from when the judgment is to take effect. Rule 63 of the Rules seems to provide the answer. Clearly, r 63 of the Rules provides the mode how a judgment is to be delivered, which is, by pronouncement in open court, and under para (2) of r 63 of the Rules, it may be read by a judge of the court or by the registrar. It seems that this was also the practice of the House of Lords where the pronouncement is made in open court in a formal way (*W Field Fr Co v Steel Construction Co* [1968] NZLR 680 at p 686). It must not be forgotten that the Rules have statutory force and are not mere rules of practice, see *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143.

In addition to the above, I also adopt the reasonings in *Surendra Singh* which the Singapore Court of Criminal Appeal, in *Ramachandran a/p Suppiah v PP* [1992] 2 SLR 707, agreed with its analysis in relation to Singapore criminal cases.

In *Surendra Singh*, the Supreme Court of India observed (at p 195):

A 'Delivery of judgment is a solemn act which carries with it serious consequences for the person or persons involved ... For that reason rules have been drawn up to determine the manner in which and the time from when the decision is to take effect and crystallize into an act which is thereafter final so far as the court delivering the judgment is concerned.'

Further, at p 196, the court held as follows:

B 'In our opinion, a judgment within the meaning of these sections is the final decision of the court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest — the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter — can be cured; *but not the hard core, namely the formal intimation of the decision and its contents formally declared in a judicial way in open court.* The exact way in which this is done does not matter. In some courts, the judgment is delivered orally or read out, in some only the operative notice to the parties and laying the draft on the table for a given number of days for inspection.

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E An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. *We lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open court.* But however it is done, it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything else up till then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. *The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the 'judgment'.*' (Emphasis added.)

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H The situation in *Chia Yan Tek* is slightly different from this case as there at the time of the pronouncement of the judgment, there was only one judge remaining on the coram, that is, Wan Adnan CJ (Malaya), whereas in this case, there were still two judges remaining on the coram, that is, Eusoff Chin Chief Justice and Wan Adnan CJ (Malaya). It would appear therefore that if the remaining judges formed the majority of the opinion, and I think so in this case, then the court shall for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of Chong Siew Fai CJ (Sabah and Sarawak). This is provided by the amended s 78 of the CJA which came into force on 1 August 1998.

I It is to be noted, however, that at the time the appeal was filed by the applicant and when it was heard and judgment was reserved, the

amendment to s 78 of the CJA had not been made yet. It is then necessary to examine the original s 78 and the amended s 78 of the CJA. The original s 78 reads:

Continuation of proceedings notwithstanding absence of Judge

- (1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall, *if the parties consent*, continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.
- (2) In any such case as is mentioned in subsection (1), the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.
- (3) *If the parties do not consent as aforesaid the appeal shall be re-heard.*
(Emphasis added.)

The amended s 78 reads:

Continuation of proceedings notwithstanding absence of Judge

- (1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall, continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the judge as aforesaid.
- (2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.

It seems clear to me that under the original provision of s 78 of the CJA, given the situation in this case, the consent of the parties is required as Chong Siew Fai CJ (Sabah and Sarawak), had retired by the time the reserved judgment was pronounced on 12 July 2000, the effective date of the judgment. I agree with the view of the learned Chief Judge that the words 'any other cause' in s 78 are clear enough to cover a situation where a judge has retired as in this case. My learned sister, Siti Norma Yaakob FCJ, shared the same view. As stated earlier, following *Chia Yan Tek*, the effective date of the judgment is 12 July 2000 and approval of the judgment by Chong Siew Fai CJ (Sabah and Sarawak), is of no consequence in view of his retirement at the material date. I can accept that the reserved judgment was unanimously given by the remaining judges, but

- A** the key issue is whether the consent of the parties has been removed by the amendment. As stated earlier, is the amendment retrospective?

It was the contention of counsel for the applicant by way of an alternative argument that the amendment is not retrospective and hence the applicant could very well exercise his right to withhold the consent if such consent was asked of him before delivery of the reserved judgment. In that event the appeal, by virtue of the original s 78 of the CJA, shall be reheard. That is the order that the applicant is asking from this court in his application before us.

- B**
- C** The applicant is not asking this court to review the judgment of the court given earlier on or as seemed to be the contention of the respondent's counsel when he relied on *Lye Thai Sang* in raising the jurisdictional point before us. The Supreme Court in *Lye Thai Sang* accepted that there are two exceptions where there can be a rehearing when it stated at p 168 thus:

- D** Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to reopen, rehear and reexamine its decision for whatever purpose. The only exception where there can be a rehearing is only to the extent provided by s 42, in particular sub-s (3) of s 42. The other exception is as provided under s 44 sub-s (3) to the effect that every order such as that envisaged in sub-s (1) of s 44 may be discharged or varied by the full court.

- E** Sections 42 and 44 of the CJA (now applicable to the Court of Appeal) are in pari materia with ss 78 and 80 of the CJA in respect of the powers of this court.

- F** The learned Chief Judge accepted that the consent of the parties prescribed under the original s 78 of the CJA is a substantive right. I agree. Given that situation, in my view, the approach should be whether the amendment to s 78 of the CJA, taking away the consent of the parties, is retrospective and if it is so, then the application fails and if it is otherwise, the applicant would be entitled to succeed.

- G** In construing whether the amendment to s 78 of the CJA is retrospective, the relevant legislation for consideration is s 30(1)(b) of the Interpretation Acts 1948 and 1967 (Act 388) which reads:

- (1) The repeal of a written law in whole or in a part shall not —
 (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or

- H** As I am of the view that the consent of the parties is a substantive right, it follows that any law removing that right will not be retrospective unless the contrary is expressed therein. The Privy Council, in the case of *Yew Bon Tew*, in dealing with the amendment to our Public Authorities Ordinance 1948 in which a limitation period of action of 36 months was substituted for the previous period of 12 months, quoted with approval at p 3 the judgment of AL Smith LJ in '*The Ydun*' [1899] P 236 (at p 245):

- I** The rule applicable to cases of this sort is well stated by Baron Wilde in *Wright v Hale* (1860) 6 H & N 227, at p 232, namely, that when a new enactment

deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.

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The Privy Council went on to state whether a statute is to be construed in a retrospective sense, and if so, to what extent depends on the intention of the legislature as expressed in the wordings of the statute, having regard to the normal construction and to the relevant provisions of any interpretation statute. In the Courts of Judicature Act (Amendment) Act 1998, the legislature did not expressly state that the amendment is retrospective or even by necessary intendment. It is my view therefore that the amendment removing the consent of the parties is not retrospective as it affects the substantive right of the applicant and it is not a matter of procedure.

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Another case that may be of assistance in considering the substantive right that was pending before it is taken away by an amendment is the Privy Council case of the *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369. This case relates to the power of the Collector of Customs in Queensland under the Excise Tariff 1902, requiring the Colonial Sugar Refining Co Ltd to pay 20,100/ excise duty in respect of 6,700 tons of sugar. They deposited the money with the collector in accordance with the Excise Act 1901, and then brought an action against the collector to recover the sum deposited. The writ in the action was issued on 25 October 1902. Under the Rules of the Supreme Court, a special case was stated by the parties for the opinion of the full court. The case was set down for argument in July 1903, but it stood over until the September sittings of the court. On 4 September 1903, the court decided that the government was entitled to retain the duty and gave judgment for the collector with costs. In the meantime, the Judiciary Act 1903 had been passed. It received the royal assent on 25 August 1903.

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The Colonial Sugar Refining Co Ltd, the appellants, being dissatisfied with the judgment of the Supreme Court of 4 September 1903, applied to the court for leave to appeal to His Majesty in Council. The application was heard by Cooper CJ and Real J. The learned judges differed in opinion. The Chief Justice thought that leave ought to be granted but Real J was of the contrary opinion. In accordance with the order in council of 30 June 1860, the opinion of the Chief Justice prevailed, and leave to appeal was accordingly granted.

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The collector, who is the respondent to an appeal presented by leave of the Supreme Court of Queensland, filed a petition asking that the appeal may be dismissed with costs on the ground that the right of appeal to His Majesty in Council given by the order in council of 30 June 1860, under which leave was granted, has been taken away by the Judiciary Act 1903, and that the only appeal from a decision of the Supreme Court of Queensland now lies to the High Court of Australia.

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It was contended on behalf of the appellants before the board that the provisions of the Judiciary Act 1903, on which the respondent (collector)

- A** relies, assuming them to be within the powers of the Commonwealth Legislature, are not retrospective so as to defeat a right in existence at the time when the Judiciary Act 1903 received the royal assent.

The board dismissed the petition with costs. Lord Macnaghten, writing for the board, stated at p 372:

- B** As regards the general principles applicable to the case, there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

- E** As the amendment to s 78 of the CJA by the Courts of Judicature (Amendment) Act 1998 affects the substantive right of the applicant, and the amended Act does not expressly or by necessary intendment makes it retrospective, the consent of the applicant to the reserved judgment by the remaining judges has not been taken away. In my view, the failure to get the consent of the applicant in this case has occasioned an injustice to the applicant. The remaining judges should have obtained the consent of the applicant before delivering the reserved judgment even though it can be considered as a majority judgment and it was a properly constituted court.

- G** In my view, as the consent of the parties was not obtained before the reserved judgment was given, and it being a substantive right of one of the parties, that is, the applicant, it follows that the judgment of the court was invalid and under the original s 78(1) read with s 78(3) of the CJA, the proper order would be for the appeal to be reheard before another panel.

- H** In addition thereto, if any injustice is caused to a party as in this case, this court can resort to its inherent powers under r 137 of the Rules of the Federal Court 1995.

This court had the occasion to consider r 137 vis-a-vis s 78 in *Chia Yan Tek*, where Mohamed Dzaiddin Chief Justice, stated at p 10:

- I** Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice. The issue of reopening or reviewing the court's own decision in the instant case therefore did not arise.

In the circumstances, I would allow the application of the applicant as his consent, being a substantive right, was not obtained before delivery of the reserved judgment by the remaining judges. In the result, the order dated 12 July 2000 is hereby set aside and the appeal shall be reheard by a newly constituted panel of the Federal Court. It follows that the respondent's application must be dismissed, and I do so order.

I agree with the order of costs made by Siti Norma Yaakob FCJ in allowing the applicant's application and dismissing the respondent's application, as well as the order in respect of the deposit by the applicant and the respondent.

Applicant's application allowed. Respondent's application dismissed.

Reported by Peter Ling

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